

ESTTA Tracking number: **ESTTA395304**

Filing date: **02/28/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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|---------------------------|---|
| Proceeding | 91196629 |
| Party | Defendant Timothy P. Dunnigan |
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| Submission | Motion to Dismiss - Rule 12(b) |
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| Date | 02/28/2011 |
| Attachments | Dunnigan Motion to Dismiss Amended Opposition.pdf (9 pages)(40014 bytes) |

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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|----------------------------|---|--------------------------------|
| Gamelink, LLC |) | |
| Opposer, |) | |
| |) | |
| v. |) | Opposition No. <u>91196629</u> |
| |) | |
| Timothy P. Dunnigan |) | |
| Applicant. |) | |
| _____ |) | |

**APPLICANT’S MOTION TO DISMISS OPPOSER’S AMENDED NOTICE OF
OPPOSITION OR, IN THE ALTERNATIVE, MOTION FOR A MORE
DEFINITE STATEMENT AND MOTION TO STRIKE MATTER
FROM THE PLEADING**

Pursuant to 37 C.F.R. § 2.116(a) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, Applicant Timothy P. Dunnigan (“Applicant”) hereby moves the Board to dismiss Opposer’s Amended Notice of Opposition with prejudice for failure to state a claim upon which relief can be granted. In the alternative, Applicant hereby moves the Board for a more definite statement and to strike portions of Opposer’s Amended Notice of Opposition pursuant to Rules 12(e) and 12(f) of the Federal Rules of Civil Procedure. Applicant’s Motion embodies his Brief in Support as required by 37 C.F.R. § 2.127(a).

INTRODUCTION

On January 13, 2011, the Board partially granted Applicant’s Motion to Dismiss Opposer’s Notice of Opposition for failure to state a claim upon which relief can be granted. Specifically, the Board struck the preamble of the Notice of Opposition and dismissed all of Opposer’s claims other than its dilution claim. On February 1, 2011, Opposer filed an Amended

Notice of Opposition containing five distinct grounds for opposition separated into five distinct counts. The dilution claim remains as Count V in the Amended Notice of Opposition.

In light of the numerous fatal deficiencies of Opposer's Amended Notice of Opposition, Applicant hereby moves the Board to dismiss Opposer's Amended Notice of Opposition with prejudice for failure to state a claim upon which relief can be granted. In the alternative, Applicant hereby moves the Board for a more definite statement and to strike portions of Opposer's Amended Notice of Opposition.

ARGUMENT

A motion to dismiss for failure to state a claim upon which relief may be granted is a test solely of the legal sufficiency of the notice of opposition. *Space Base Inc. v. Stadis Corp.*, 17 U.S.P.Q.2d 1216, 1218 (TTAB 1990). In order to withstand such a motion, a pleading must allege such facts as would, if proved, establish that the opposer is entitled to the relief sought, that is, that (1) the opposer has standing to maintain the proceeding, and (2) a valid statutory ground exists for denying the registration sought. *Young v. AGB Corp.*, 47 U.S.P.Q.2d 1753 (Fed. Cir. 1998). The opposition must set forth a short and plain statement showing why the opposer believes it would be damaged by the registration of the opposed mark and state the grounds for opposition. 37 C.F.R. § 2.104(a). An opposer's pleading must include enough detail to give the applicant fair notice of the basis for each claim. *See McDonnell Douglas Corp. v. National Data Corp.*, 228 U.S.P.Q. 45, 48 (TTAB 1985). In addition, an opposer's pleading must set forth opposer's "claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances" and each claim founded upon a separate transaction or occurrence must be stated in a separate count whenever a separation would facilitate the clear presentation of the matters pleaded. Fed. R. Civ. P. 10(b).

In the event a pleading states a claim upon which relief can be granted, but the pleading is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the responding party may move for a more definite statement. *See* Fed. R. Civ. P. (12)(e). The motion must point out the defects complained of, specify the details which the movant desires to have pleaded, and indicate that the movant is unable to frame a responsive pleading without the desired information. *Id.* Furthermore, the Board may order stricken from a pleading an impermissible or insufficient claim (or portion of a claim) upon motion or upon its own initiative. Fed. R. Civ. P. (12)(f).

For ease of reading, Applicant will separately address each of the five counts (including the preamble) in the order presented by Opposer in the Amended Notice of Opposition.

PREAMBLE

In Paragraph 1 of the Amended Notice of Opposition, Opposer incorporates “all statements made on the ESTTA form online.” Applicant can only assume that Opposer is referring to the statements made on the ESTTA form that was generated with the filing of the *original* Notice of Opposition since no statements are actually able to be made on the ESTTA form that was generated with the filing of the Amended Notice of Opposition. As Applicant noted in his previous motion to dismiss, the cover sheet generated by ESTTA in connection with the original Notice of Opposition consists of a rambling of facts, allegations, and unsupported legal conclusions to which Applicant cannot reasonably be expected to respond and which mixes together all different claims for relief. In addition, although it is not entirely clear from the Board’s January 13, 2011 decision, it appears that the Board already struck the statements in the ESTTA form by virtue of striking the preamble in the original Notice of Opposition.

Applicant further notes that the ESTTA cover sheet allegedly generated by the filing of Opposer's Amended Notice of Opposition has not actually been served on Applicant by Opposer.

In view of the above, Applicant respectfully requests that the Board dismiss any and all statements and claims for relief incorporated by reference in Paragraph 1 of the Amended Notice of Opposition and to strike Paragraph 1 from the Amended Notice of Opposition.

COUNT I
PRIORITY AND LIKELIHOOD OF CONFUSION UNDER
TRADEMARK ACT SECTION 2(d)

For the reasons set forth under the section entitled "PREAMBLE," Applicant respectfully requests that the Board dismiss any and all statements and claims for relief incorporated by reference in Paragraph 3 of the Amended Notice of Opposition and to strike Paragraph 3 from the Amended Notice of Opposition.

In Count I, Opposer alleges that Applicant's GAME LINK mark is likely to cause confusion with its prior use of GAME LINK. However, it is practically impossible for Applicant to accurately and fully respond to Opposer's allegations seeing that Paragraphs 4, 6, 7, and 8 all contain multiple allegations and are numerous sentences in length. Without question, the pleading itself is so vague and ambiguous that Applicant cannot form a responsive pleading in good faith or without prejudice to himself. Applicant strongly believes that he should not be compelled to parse Opposer's paragraphs in order to properly admit or deny the allegations therein. Rather, Opposer should be following the rules of pleading and provide its factual allegations in short paragraphs that are limited to only a single set of circumstances.

Because Opposer's pleading of Count I is so vague and ambiguous that Applicant cannot form a proper responsive pleading, Applicant respectfully requests that the Board order Opposer to amend Count I so as to provide a more definite statement to which Applicant may respond.

COUNT II
FALSE SUGGESTION OF A CONNECTION UNDER
TRADEMARK ACT SECTION 2(a)

For the reasons set forth under the section entitled "PREAMBLE," Applicant respectfully requests that the Board dismiss any and all statements and claims for relief incorporated by reference in Paragraph 9 of the Amended Notice of Opposition and to strike Paragraph 9 from the Amended Notice of Opposition.

In Count II, Opposer alleges that Applicant's GAME LINK mark falsely suggests a connection with Opposer. However, Opposer's allegations are skeletal legal conclusions that are devoid of any facts whatsoever. To be sure, there are absolutely no factual allegations as to (1) how or why the public would allegedly recognize Applicant's mark as referring to Opposer, (2) the alleged fame and reputation of Opposer, or (3) how or why the public would allegedly presume a connection between Applicant's mark and Opposer.

Because Opposer has clearly failed to allege sufficient facts and details to give Applicant fair notice of the basis for its claim of false suggestion of a connection, Count II of the Amended Notice of Opposition should be dismissed for failure to state a claim upon which relief can be granted.

COUNT III
MERE DESCRIPTIVENESS UNDER TRADEMARK
ACT SECTION 2(e)(1)

For the reasons set forth under the section entitled "PREAMBLE," Applicant respectfully requests that the Board dismiss any and all statements and claims for relief incorporated by

reference in Paragraph 14 of the Amended Notice of Opposition and to strike Paragraph 14 from the Amended Notice of Opposition.

In Count III, Opposer argues only that the words GAME LINK are merely descriptive of Applicant's services in that Applicant provides use of linked video game consoles to his customers. However, even if the Board finds that the words GAME LINK are merely descriptive (which is not even an issue in this case since Applicant has already voluntarily disclaimed exclusive rights to GAME LINK), Applicant would still be entitled to registration of his mark because the mark is presented in a highly stylized logo format and not just in standard characters.

Because Opposer has failed to allege how Applicant's mark, *in its entirety*, is merely descriptive of Applicant's services, Count III of the Amended Notice of Opposition should be dismissed for failure to state a claim upon which relief can be granted.

COUNT IV **FRAUD**

For the reasons set forth under the section entitled "PREAMBLE," Applicant respectfully requests that the Board dismiss any and all statements and claims for relief incorporated by reference in Paragraph 18 of the Amended Notice of Opposition and to strike Paragraph 18 from the Amended Notice of Opposition.

In Count IV, Opposer seemingly alleges that Applicant made false, material representations of fact in connection with his application for registration of his GAME LINK mark with the intent to deceive the USPTO. However, Applicant cannot determine from Opposer's incomprehensible allegations in Paragraphs 18-27 what representations of fact Opposer is referring to, how they are allegedly false, how they allegedly deceived the USPTO, or whether they are even material representations of fact to begin with. Moreover, most of the

paragraphs contain multiple allegations and are numerous sentences in length. In sum, the pleading is so vague and ambiguous that Applicant simply cannot decipher and properly respond to Opposer's allegations of fraud in their current form without unduly prejudicing himself. Applicant also believes that Opposer has not met the heightened pleading requirements for fraud as required under Rule 9(b) of the Federal Rules of Civil Procedure.

Because Opposer has clearly failed to allege with particularity sufficient facts and details to give Applicant fair notice of the basis for its claim of fraud on the USPTO, Count IV of the Amended Notice of Opposition should be dismissed for failure to state a claim upon which relief can be granted. In the alternative, should the Board find that Opposer has stated a claim upon which relief can be granted, Applicant requests that the Board order Opposer to amend Count IV so as to provide a more definite statement to which Applicant may respond.

COUNT V **DILUTION**

For the reasons set forth under the section entitled "PREAMBLE," Applicant respectfully requests that the Board dismiss any and all statements and claims for relief incorporated by reference in Paragraph 1 of Count V of the Amended Notice of Opposition and to strike Paragraph 1 of Count V from the Amended Notice of Opposition.

Although the Board has already determined that Opposer's dilution claim states a claim upon which relief can be granted, the pleading itself is so vague and ambiguous that Applicant cannot form a responsive pleading in good faith or without prejudice to itself. Almost every paragraph in Count V consists of multiple sentences containing a variety of allegations, thereby making it unnecessarily and unreasonably difficult for Applicant to admit or deny the specific, individual allegations. Applicant believes he is entitled to a clear and concise pleading to which he can easily respond without having to dissect each paragraph.

Because Opposer's pleading of Count V is so vague and ambiguous that Applicant cannot form a proper responsive pleading, Applicant respectfully requests that the Board order Opposer to amend Count V so as to provide a more definite statement to which Applicant may respond.

CONCLUSION

In sum, Opposer's Amended Notice of Opposition is unquestionably deficient, so much so that Applicant cannot answer it without risking undue prejudice to himself. Therefore, Applicant respectfully requests that the Board dismiss Opposer's Amended Notice of Opposition with prejudice for failure to state a claim upon which relief can be granted. In the alternative, Applicant respectfully requests that the Board order Opposer to provide a more definite statement and to strike portions of Opposer's Amended Notice of Opposition as specifically indicated above.

Respectfully submitted,

TIMOTHY P. DUNNIGAN

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Dated: _____ 2/28/2011 _____

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing has been served by sending said copy on 2/28/2011 via First-Class Mail, postage pre-paid, to:

Philip Green
Law Offices of Green and Green
1000 4th St., Suite 595
San Rafael, CA 94901

/met20/
Morris E. Turek, Attorney for Applicant